



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

REGION 5

77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

MAR 22 2012

Nancy King  
Chief, Rules Development Branch  
Office of Legal Counsel  
Indiana Department of Environmental Management  
100 North Senate Avenue  
Indianapolis, Indiana 46206-6015

Dear Ms. King:

I write to reiterate the U. S. Environmental Protection Agency's concerns about pending legislation. U.S. EPA has had long-standing concerns that Indiana's authority to enforce criminal environmental laws does not meet the minimum standards required under federal environmental statutes.<sup>1</sup> We initially brought our concerns to the attention of IDEM in 2007. The Governor's Office transmitted to us proposed legislation addressing our concerns, and, in January of 2008, I wrote to the Governor's Office expressing a positive view of those proposed changes. Unfortunately, the proposed legislation was not enacted in the same form we reviewed. In January 2009, I wrote to IDEM describing the areas in which the Indiana statute still failed to meet the minimum standards required. Since that time, representatives of U.S. EPA and IDEM have discussed these issues in detail. Most recently, we understand that a bill, identified as Senate Bill No. 300, has been introduced in the Indiana Legislature attempting to address our concerns. After reviewing SB 300, it appears to us that this legislation fails to address U.S. EPA's concerns in several important areas:

Enforcement of air regulations - the proposed legislation would leave standing the current situation in which a number of Clean Air Act regulations are not criminally enforceable under Indiana law, including NSPS, SIP and NESHAP regulations. While some violations of these rules might be addressed as a permit violation under current Indiana laws, the asbestos regulations do not require a permit. As a result, it appears that neither a knowing nor a negligent violation of the asbestos regulations is a state crime in Indiana. Providing a mechanism for

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<sup>1</sup> Regulations under the Clean Air Act (42 U.S.C. §§ 7401 through 7671q) specify the requirements for federal approval of state environmental programs, and for delegation of the federal program to a state are published at 40 CFR §§ 51.230, 70.1140 and 63.91(d); requirements for federal approval of state National Pollutant Discharge Elimination System (NPDES) programs under the Clean Water Act (33 U.S.C. §§ 1251 through 1387) appear at 40 CFR § 123.27. For simplicity, this letter will refer to these regulations as delegation requirements.

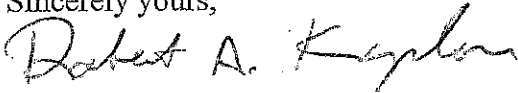
criminal enforcement of "any applicable requirement" of the CAA regulations is a requirement of Indiana's CAA delegation.

Unpermitted water discharges - U.S. EPA previously pointed out that, under Indiana law, unpermitted discharges are only enforceable if they "caused or contributed to a polluted condition" of the receiving water. This is a more restrictive standard than required under federal law, and is required to be replicated by the CWA delegation regulation. SB 300 would make no relevant changes.

Mental State - U.S. EPA asked Indiana to provide water crimes with the same mental state as currently found in the CWA, namely, "knowing" or "negligent" acts. Instead, SB 300 would amend the water portion of the statute to create "willful" and "negligent" acts. A willful mental state would inappropriately restrict the application of the statute to a far narrower number of potential violations than the "knowing" standard.

I am concerned that, several years after initiating a discussion of these issues with officials from both IDEM and the Governor's Office, Indiana currently has not proposed an adequate remedy. As you know, delegations are an important part of the federal state relationship, and it would be a serious step for U.S. EPA to withdraw any one of the delegation agreements with Indiana now in effect. Before we consider taking such a step, we want to give you the opportunity to meet with us, and explain what steps you propose to take to remedy the situation. We look forward to working with you to improve Indiana's environmental crimes authority.

Sincerely yours,



Robert A. Kaplan  
Regional Counsel